92-1407

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

PATRICIA WILLIAMS HOWARD,

Appellant,

vs.

WOLFF BROADCASTING COMPANY,

Appellee

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The ultimate question presented for review is whether the Alabama Supreme Court applied the common-law doctrine of at-will employment in an unconstitutional manner, such that future interpretations of the law in question will allow an employer hide behind the veil of this doctrine to discharge employees for impermissible reasons. Specifically: Did the Alabama Supreme Court deny Appellant's Constitutionally-guaranteed right to Equal Protection of the Law in rendering its decision in the case below?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Jurisdictional Statement	1
Federal Provisions at Issue	2
Statement of the Case	3
Argument	9
Appendix A. Order Granting Summary Judgment	1a
Appendix B. Opinion of the Supreme Court of Alabama . . .	1b

TABLE OF AUTHORITIES

Cases	Page
Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977)	12
Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971)	11
Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977)	12
Comerford v. International Harvester Co., 235 Ala. 376, 178 So. 894 (1938)	11
Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)	13
EEOC v. Pettegrove Trucking Service, Inc., 716 F.Supp. 1430 (S.D. Fla. 1989)	12
Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968)	11
Fike v. Goldkist, Inc., 514 F.Supp. 722 (N.D. Ala. 1981)	12
Finley v. Beverly Enterprises, Inc., 499 So.2d 1366 (Ala. 1986)	10
Henry v. First National Bank of Clarksdale, 444 F.2d 1300 (5th Cir. 1971)	11

Cases **Page**

Hinrichs v. Tranquilaire Hospital, 352 So.2d 1130 (Ala. 1977) 9, 10, 11

Hishon v. King & Spalding, 678 F.2d 1022, (11th Cir. 1982) 12

Johnson v. Gary, 443 So.2d 924 (Ala. 1983) . . . 10

Kirchberg v. Feenstra, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) 12

Manufacturers Hanover Trust Co. v. US, 775 F.2d 459, (2nd Cir. 1985) 12

Martin v. Tapley, 360 So.2d 708 (Ala. 1978) . . . 10

Montgomery v. Big B, Inc., 460 So.2d 1286 (Ala. 1984) 10

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) . . . 11

Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) 12

Reynolds v. Sims, *377 US 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506 (1964)* *12*

Salter v. Alfa Insurance Co., Inc., 561 So.2d 1050 (Ala. 1990) 10

Cases **Page**

Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146 (5th Cir. 1981) 12

Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 11

Tennessee Coal, Iron & Railway Co. v. Kelly, 163 Ala. 348, 50 So. 1008 (1909) 10

United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921) 11

Williams v. Killough, 474 So.2d 680 (Ala. 1985) 10

Statutes

United States Constitution, Amendment XIV, § 1 . . . . . 2, 9, 11

42 USC § 2000e *et seq* 2, 9, 11

42 USC § 2000e(b). 2, 12, 13

42 USC § 2000e-2. . . . . 6, 7

42 USC § 2000e-2(a). 3, 10, 12

Regulations **Page**

47 CFR § 73.2080 9

OPINIONS BELOW

On September 1, 1991, the Circuit Court of Conecuh County, Alabama granted Appellee's Summary Judgment as to Appellant's cause of action. In its order, the Circuit Court denied Appellant any remedy for the egregious actions taken by Appellant, her former employer, regarding her termination . A copy of the Order is attached as Appendix A.

Appellant appealed the order of the Circuit Court of Conecuh County to the Supreme Court of Alabama. Upon hearing the arguments of both parties, the Alabama Supreme Court affirmed the ruling of the Circuit Court of Conecuh County. The opinion of the court has not yet been released for publication, but is currently cited as 1992 WL 341847 (Ala), November 25, 1992. A copy of the Opinion is attached as Appendix B.

JURISDICTIONAL STATEMENT

Appellant seeks to establish a public policy exception to the application of Alabama's common law doctrine of at-will employment regarding her particular cause of action. The November 25, 1992, ruling of the Alabama Supreme Court has denied Appellant the benefit of her Constitutionally-guaranteed right to Equal Protection under the Law. Appellant, in filing this petition for Writ of Certiorari, seeks to overturn the ruling of the Supreme Court of Alabama. This Court's jurisdiction is invoked under 28 USC § 1257(a) and 28 USC § 2101(c).

FEDERAL PROVISIONS AT ISSUE

The following Constitutional and statutory provisions are at issue in this case:

The United States Constitution, Amendment XIV, Section 1, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 2000e(b), which states:

> The term "employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such a person, but such term does not include \
> (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership

> club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 USC § 2000e-2(a), which states:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Appellant is a former disc jockey who lost her job solely because she is female. Appellee is her former employer, a radio station licensed to operate under FCC regulations and located in the State of Alabama.

Appellant was hired by Appellee in the fall of 1987. During the hiring process, Appellant noted a sign in the offices of Appellee which contained a statement of its equal employment policies. Appellant interpreted the content of the sign in question to state that Appellee would not discriminate against females, blacks, or any others. However, Appellant lost her job on January 26, 1988, when the Station Manager, Appellee's agent, informed her that she was fired. When Appellant questioned him as to the reason for her termination, the agent stated that the owner's wife did not want any females on the air at her husband's radio station. Appellee's acts and its discriminatory rationale were subsequently documented in a typed letter and signed by the agent in question.

At the time Appellant was terminated, Appellee only employed seven (7) persons. As such, Appellant was without a specific remedy under applicable Federal Civil Rights legislation. Further, the State of Alabama has not enacted a Civil Rights Act of its own. Therefore, Appellant was forced to initiate any legal action in response to her wrongful termination under the laws of the State of Alabama. Thus, on October 2, 1989, she filed a Complaint in the Circuit Court of Conecuh County against Appellee for Fraud and Breach of Contract, and against Karen Wolff, the station owner's wife, for Intentional Interference with Business Relations. Although Appellant's Complaint did not specifically allege an action sounding in sexual discrimination under 42 USC § 2000e *et seq.*, the gravamen of such Complaint was the wrongful and discriminatory acts of her former employer. For example, in Appellant's Introductory Allegations, she avers that "[o]n or about October 1,

1987, Plaintiff was hired by Defendants Wolff Broadcasting, Doe No.1 and/or Doe No.3, to perform the duties of a disc jockey. When Plaintiff applied for that job, Defendants represented to her that they were an equal opportunity employer, and therefore would not discriminate against their employees on the basis of race, sex, religion or national origin. Plaintiff relied on that representation, and accepted a job with Defendants as a disc jockey. Nevertheless, on or about January 26, 1988, Plaintiff was terminated solely because she was a female. She was terminated after Defendant, Karen Wolff, who was the wife of the owner of Wolff Broadcasting, insisted that Plaintiff be terminated because she did not want females working as disc jockeys for Wolff Broadcasting. Further claims stated (1) that "Defendants Wolff Broadcasting, Doe No.1 and/or Doe No. 3, expressly represented to Plaintiff when hiring her that she would not be discriminated against on the basis of sex. Said representation was false and was known by Defendants to be false when made. Plaintiff reasonably relied on said representation to her detriment. She accepted employment with Wolff Broadcasting, and continued to work believing that she would not be terminated or discriminated against on the basis of her sex;" (2) that "Defendants, Wolff Broadcasting, Doe No.1 and/or Doe No.3, expressly represented to Plaintiff when she applied for the job that she would not be discriminated against on the basis of sex;" (3) that "[o]n or about January 26, 1988, Plaintiff was discharged from her employment with Defendants Wolff Broadcasting, and Doe No.1 and/or Doe No. 3, because Defendant Karen Wolff and/or Doe No. 2 insisted that no females be employed as disc jockeys by Defendant Wolff Broadcasting. Said discharge

from employment constitutes a breach of contract, and a breach of Defendants' express promises to Plaintiff that Plaintiff would not be discriminated against or terminated from employment on the basis of sex;" and (4) that "[o]n or about January 26, 1988, Plaintiff was discharged from her employment with Defendant Wolff Broadcasting when Karen Wolff and/or Doe No. 2 insisted that the owner of Wolff Broadcasting fire Plaintiff because she was a female."

On June 17, 1991, after the pleadings in this case were closed and discovery was conducted, Appellee filed and served its Motion for Summary Judgment, arguing that Appellant's remedy lay in the Federal court system, as an action under Title VII of the Civil Rights Act. In fact, Appellee stated, in its Brief in Support of Summary Judgment, that "the thrust of Plaintiff's Complaint is a violation of 42 USC § 2000e-2." In her Response to said Motion for Summary Judgment, Appellant stated that "at the time of the firing Wolff Broadcasting only had seven (7) employees. Because of that fact, the Equal Employment Opportunity Commission did not have jurisdiction over Patricia Howard's cause of action...Plaintiff, Patricia Howard, did not have jurisdiction to file a claim with the EEOC. *See* 42 USC § 2000e-2." Appellant also stated that "[o]n January 26, 1988, while Patricia Howard was on the air, Keith Holcombe, the station manager, drove to the radio station and informed her that she was fired. When he fired her, Mr. Holcombe told her that she was being fired because Karen Wolff, the owner's wife, did not want any females on the air." In her Response to Appellee's Motion for Summary Judgment, Appellant also argued that the Circuit Court of Conecuh County,

Alabama, should create a public policy exception to the common law at-will employment doctrine, urging that "[d]iscrimination on the basis of race, color, sex, religion, and/or national origin has been recognized as one of the evils of American society that must be eliminated. 42 USC § 2000e-2 specifically prohibits this type of discrimination. There is absolutely no justification for this abhorrent act. It is for this type of act that a public policy exception should be created. A strict interpretation of the employment-at-will doctrine is an antiquity of injustice that should be replaced by exceptions that further the stated public policy of this country and state."

After both parties submitted their evidence and briefs, Summary Judgment was entered in Appellee's favor at a hearing occurring on July 2, 1991. In its Order, the Circuit Court for Conecuh County stated that "...the decision of the Court regarding the employment contract, i.e. that it was an 'at will' contract, means that the Plaintiff could be fired for a good reason, a bad reason, or no reason at all..." The Circuit Court also held that it was unable to allow Appellant to proceed with her case under a public policy exception to the at-will employment doctrine, stating "[t]his court is unable to do so, having considered the numerous precedents established by the Supreme Court of Alabama disallowing a 'public policy' exception to the 'at will' doctrine..." Upon the Circuit Court's granting of Appellee's motion, Appellant entered into a Pro Tanto Release and Settlement Agreement with Defendant Karen Wolff on October 9, 1991, and the Circuit Court of Conecuh County entered an Order making the judgment final as to all parties on November 12, 1991.

Appellant filed a timely Notice of Appeal with the Supreme Court of Alabama on December 26, 1991. The subsequent appeal asked the court to reverse the entry of Summary Judgment in Appellee's favor. The Alabama Supreme Court released its opinion on November 25, 1992. In its opinion, the court upheld the decision of the Circuit Court of Conecuh County on all grounds asserted. Notably, the Alabama Supreme Court declined to carve out a public policy exception to the common law doctrine of at-will employment, as such body of law exists in Alabama, stating that "this Court has so far declined to judicially create a public policy exception to the employment 'at-will' doctrine." The court also announced that "[t]he Court has consistently refused to create a cause of action for wrongful discharge on 'public policy' grounds, for three reasons: (1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule well-established employment law; and (3) 'contrary to public policy' is too vague or nebulous a standard to justify creation of a new tort." Although the Alabama Supreme Court stated that it "should not be understood as condoning a person's discharge because of gender," it has, in effect, sanctioned the termination of employees who share Appellant's plight--being a female, at-will employee of a small employer. It is believed that the Alabama Supreme Court's ruling of November 25, 1992 will lead to further violations of employees' rights to Equal Protection of the Law in the future. Such are the reasons for Appellant's present petition.

ARGUMENT

In this appeal, Appellant requests that this Court grant Certiorari to hear her claims sounding in Equal Protection and sex discrimination. The basis for such appeal lies in the November 25, 1992, ruling of the Alabama Supreme Court, which declined to grant her remedy or relief for injuries caused by the discriminatory acts of Appellee, her former employer. In upholding the Circuit Court of Conecuh County's Order granting Appellee's Motion for Summary Judgment, the Alabama Supreme Court has denied Appellant her right to Equal Protection of the Law, as is guaranteed her by the Fourteenth Amendment of the United States Constitution.

In its Opinion, the Alabama Supreme Court held that it would not create a public policy exception to the common law doctrine of at-will employment as it now exists under Alabama law. The State court announced that, "[o]n the public policy issue, the Congress of the United States has elected to exempt Wolff from the provisions of law relating to discrimination in employment. While we recognize that under the provisions of 47 CFR § 73.2080, Wolff is prohibited from discriminating on the basis of sex, we do not think, especially in view of the principle stated in *Hinrichs*, that we should judicially create a wrongful discharge action based on 'public policy' grounds in this case involving a licensee of the FCC." Thus, the highest court in the State of Alabama has identified and recognized the issue in question as one of sex discrimination. In fact, the first sentence of the Opinion states "[t]he plaintiff was fired by Wolff Broadcasting Corporation ("Wolff") solely

because she was a female." However, the State court refused to grant the victim any sort of relief or remedy, denying Appellant of her right to Equal Protection of the Law.

The Alabama Supreme Court's ruling was based on the common-law doctrine of at-will employment. Under that body of law, an employer can fire an employee-at-will for any reason, whether it is a good reason, bad reason, or no reason. *See Salter v. Alfa Insurance Co., Inc.*, 561 So.2d 1050 (Ala. 1990); *Montgomery v. Big B, Inc.*, 460 So.2d 1286 (Ala. 1984); *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130 (Ala. 1977). However, an employer is limited to the confines of lawful actions in exercising its right to terminate such an employee. In the case of *Tennessee Coal, Iron & Railway Co. v. Kelly,* 163 Ala. 348, 50 So. 1008 (1909), the Alabama Supreme Court, in explaining both the at-will employment doctrine and the common law action of intentional interference with contractual relations, held that "[i]f one does an act which is legal in itself and violates no right of another, the fact that this rightful act is done from bad motives or with bad intent toward the person so injured does not give the latter a right of action against the former. Therefore, if the defendant's acts complained of ... were legal in themselves, and violated no superior right of the plaintiff, they were not actionable." *Id* at 1010. Such limitation has been recognized throughout the history of the at-will employment doctrine. *See Salter v. Alfa Insurance Co.,* Inc., *supra,* at 1052; *Finley v. Beverly Enterprises, Inc.,* 499 So.2d 1366, 1367 (Ala. 1986); *Williams v. Killough,* 474 So.2d 680, 682 (Ala. 1985); *Johnson v. Gary,* 443 So.2d 924, 926 (Ala. 1983); *Martin v. Tapley,* 360 So.2d 708,

709 (Ala. 1978); *Hinrichs v. Tranquilaire Hospital, supra,* at 1131; *Comerford v. International Harvester Co.,* 235 Ala. 376, 178 So. 894 (1938); *United States Fidelity & Guaranty Co. v. Millonas,* 206 Ala. 147, 89 So. 732, 735 (1921). 42 USC 2000e-2(a) mandates that employment discrimination on the basis of sex is unlawful. Therefore, Appellee had no right to discharge Appellant under the at-will employment doctrine, or any other legal theory. It logically follows that the Courts of the State of Alabama should not have upheld and legitimized such actions. Likewise, this Court should not condone the activities of employers such as Appellee or judicial pronouncements such as the one at issue.

By its express terms, the protection guaranteed by the Fourteenth Amendment of the United States Constitution are limited to actions taken by a State itself. U.S. CONST. AMD. XIV, § 1. It has been held that judicial action in private disputes is a form of state action sufficient to bring a claim within the application of the Equal Protection Clause. *See Business Executives' Move for Vietnam Peace v. FCC,* 450 F.2d 642 (DC Cir. 1971); *Henry v. First National Bank of Clarksdale,* 444 F.2d 1300 (5th Cir. 1971); *Edwards v. Habib,* 397 F.2d 687 (DC Cir. 1968); *New York Times Co. v. Sullivan,* 376 US 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964); *Shelly v. Kraemer,* 334 US 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). "The test is not the form in which state power has been applied, but whether such power has in fact been exercised." *New York Times Co. v. Sullivan, supra,* 376 US at 265, 84 S.Ct. at 718, 11 L.Ed.2d at ____. In the instant case, the highest court in the State of Alabama has, in essence, held that Appellee was entitled to discriminate against Appellant on the basis of her sex. In so doing, the State

of Alabama has created a classification which is impermissible under the principle of Equal Protection of the Law.

Equal Protection seeks to guarantee the uniform treatment of persons standing in the same relation to the governmental action challenged or questioned. *Reynolds v. Sims,* 377 US 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506 (1964). In the instant case, Appellant has been denied the benefit of such guarantee, as the holding of the Alabama Supreme Court has distinguished her, and others like her, from other females employed throughout the State. As the law of Alabama now stands, women working for employers with fifteen (15) or more employees are entitled to claim the protection of 42 USC § 2000e-2(a), while Appellant and others similarly situated are not so entitled. *See* 42 USC § 2000e(b); *EEOC v. Pettegrove Truck Service, Inc.,* 716 F.Supp. 1433 (S.D. Fla 1989); *Hishon v. King & Spaulding,* 678 F.2d 1022 (11th Cir. 1982); *Fike v. Gold Kist, Inc.,* 514 F.Supp. 722 (N.D. Ala. 1981); and *Burke v. Friedman,* 556 F.2d 867 (7th Cir. 1977) for the proposition that the protection of 42 USC § 2000e *et seq.* are expressly limited in their terms to include only employers having fifteen (15) or more employees.

In determining that a classification based on sex is permissible under the Equal Protection Clause, it must be found that such classification is substantially related to important governmental objectives. *Manufacturer's Hanover Trust Co. v. U.S.,* 775 F.2d 459 (2nd Cir. 1985); *Seoane v. Ortho Pharmaceuticals, Inc.,* 660 F.2d 146 (5th Cir. 1981); *Kirchberg v. Feenstra,* 450 US 455, 101 S.Ct. 1195, 67 L.Ed.2d. 428 (1981); *Orr v. Orr,* 440 US 268, 99 S.Ct. 1102, 59 L.Ed.2d. 306 (1979); *Califano v.*

Webster, 430 US 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Craig v. Boren,* 429 US 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). In the case below, the Alabama Supreme Court held that Appellee had an absolute right to terminate Appellant's employment, for whatever reasons it chose to offer. In so doing, the court created a classification of women who may be denied their Civil Rights because their employer has hired fewer than fifteen (15) persons. The logical question presented by the instant situation is: what important governmental objectives can possibly be furthered by allowing an employer to discriminate against its employees on the basis of sex? From the outset, it appears that the classification created by the Alabama court's ruling is arbitrary, and should be reversed.

Alabama should no longer be a safe harbor for companies and individuals who desire to promulgate discrimination on the basis of race, religion, national origin, or sex. The citizens of Alabama deserve to have employment opportunities with reputable and moral businesses. In making its ruling of November 25, 1992, the Alabama Supreme Court has refused to take a stand and pronounce that businesses that intend to discriminate on the basis of race, religion, national origin, or sex need not darken the doors of Alabama. In fact, the court's opinion has enabled small employers in Alabama to continue to discriminate against their employees, so long as they are hired "at-will." Appellee, and other employers in the State of Alabama, should not be able to discriminate against their employees because they do not fit the statutory definition of "employer" found at 42 USC § 2000e(b), and thus, do not have to abide by Federal Civil Rights Laws. The use of the employment at-will

doctrine to escape liability for such wrongful terminations as has been experienced by Appellant should not be encouraged or permitted by the State of Alabama, or by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT OF CONECUH COUNTY, ALABAMA

PATRICIA WILLIAMS HOWARD,
Plaintiff,

vs. CASE NO. CV-89-099

WOLFF BROADCASTING COMPANY, et. al.,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

The defendant, WOLFF BROADCASTING COMPANY, has filed a Motion for Summary Judgment, and the Court has considered same.

It is the opinion of the Court that the claim of the Plaintiff, in Count II, for breach of an employment contract is subject to the rule of construction which makes the contract described by the pleadings and evidence in support of the Motion for Summary Judgment an "at will" employment contract. The Court has considered the argument of the Plaintiff that a sign stating that there would be no discrimination based upon race, color or gender, was observed by the Plaintiff during her hiring and employment, and this Court is of the opinion that, at most, this sign was a general statement of company policy and was not specific enough to rise to the level of a contract obligation.

The claim of the Plaintiff in Count I, for promissory fraud, was unsupported by any substantial

evidence of an intention to defraud at the time the parties entered into the contract of employment. Summary judgment is appropriate regarding that cause of action. In addition, the decision of the Court regarding the employment contract, i.e. that it was an "at will" contract, means that the Plaintiff could be fired for a good reason, a bad reason, or no reason at all, and thus could not show damage if there were fraudulent intent.

The Plaintiff also urged this Court allow the action to proceed under "public policy" exception to the employment at will doctrine. This Court is unable to do so, having considered the numerous precedents established by the Supreme Court of Alabama disallowing a "public policy" exception to the "at will" doctrine, and having determined that any change in the substantive law of the state must come from the legislature.

It is therefore ORDERED that said motion be and hereby is GRANTED as to Counts I and II of the Complaint.

Done at Evergreen, Alabama, this the 1st day of September, 1991.

Sam Welch
Circuit Judge

APPENDIX B

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1910603

Patricia Williams Howard

v.

Wolff Broadcasting Corporation

Appeal from Conecuh Circuit Court

(CV-89-099)

MADDOX, JUSTICE.

The Plaintiff was fired by Wolff Broadcasting Corporation ("Wolff") solely because she was a female. The principal question presented here is whether this Court should carve out an exception to the employee-at-will doctrine and hold that plaintiff stated a cause of action for breach of an implied contract of employment, and for fraud.

The basic facts are not significantly disputed. In September or October 1987, the plaintiff, Patricia Williams Howard, inquired about employment with Wolff,

which operated a radio station. She was unemployed at that time. Shortly thereafter, Keith Holcombe, the manager of the station, called her and set up an interview. Wolff hired Howard as a disc jockey and advertising salesperson. Howard had no prior experience of any kind in the radio business. Howard presented evidence that, during the process of her hiring, she noted in the lobby of the station a sign stating that Wolff would not discriminate against "females, blacks, or any others". There was no written contract of employment.

On January 26, 1988, while Howard was on the air, Keith Holcombe drove to the station and informed her that she was fired. When he fired her, Holcombe told her that she was being fired because Karen Wolff, whose husband owned Wolff, did not want any females on the air. On that same night, Howard typed a letter stating that she was fired because Karen Wolff did not want females on the air. Howard says this letter was signed by Keith Holcombe.

On October 2, 1989, Howard filed a complaint against Wolff, alleging fraud and breach of contract, and against Karen Wolff, alleging intentional interference with business relations.[1]

After discovery was conducted, Wolff moved for a summary judgment, on the ground that Howard had failed, as a matter of law, to establish that she was

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[1]. When Wolff fired Howard, it had only seven employees, therefore, the Equal Employment Opportunity Commission did not have jurisdiction over Howard's complaint of discrimination. Likewise, Howard had no cause of action under federal law. See 42 U.S.C. § 2000(e)(2) (1972).

entitled to any relief. On September 1, 1991, after a hearing on Wolff's motion for summary judgment, the trial judge entered a judgment in favor of Wolff.[2] The court entered an order making the judgment final as to all parties on November 12, 1991. Howard appeals from Wolff's summary judgment on the claims of breach of contract and fraud.

Rule 56, A.R.Civ.P., sets forth a two-tiered standard for entering summary judgment. The rule requires the trial court to determine (1) that there is no genuine issue of material fact and (2) that the moving party is entitled to a judgment as a matter of law. The burdens placed on the moving party by this rule have often been discussed by this Court:

> "'The burden is on one moving for summary judgment to demonstrate that no genuine issue of material fact is left for consideration by the jury. The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact. *Woodham v. Nationwide Life Ins. Co.*, 349 So.2d 1110 (Ala. 1977); *Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortg. Co.*, 390 So.2d 601 (Ala. 1980); *Fulton v. Advertiser Co.*, 388 So.2d 533 (Ala. 1980).'"

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[2]. Howard entered into a pro tanto release and settlement agreement with the defendant Karen Wolff, on October 9, 1991, on her claim alleging interference with a business relation.

Berner v. Caldwell, 543 So.2d 686, 688 (Ala. 1989) (quoting *Schoen v. Gulledge,* 481 So.2d 1094 (Ala. 1985)).

The standard of review applicable to a summary judgment is the same as the standard for granting the motion, that is, we must determine whether there was a genuine issue of material fact and, if not, whether the movant was entitled to a judgment as a matter of law. Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and resolve all reasonable doubts against the movant. *Wilson v. Brown,* 496 So.2d 756, 758 (Ala. 1986); *Harrell v. Reynolds Metals Co.,* 495 So.2d 1381 (Ala. 1986). See also *Hanners v. Balfour Guthrie, Inc.,* 564 So.2d 412 (Ala. 1990).

Because this action was not pending on June 11, 1987, Ala. Code 1975, § 12-21-12 mandates that the nonmovant meet her burden by "substantial evidence". *Bass v. SouthTrust Bank of Baldwin County,* 538 So.2d 794, 797-98 (Ala. 1989). Under the substantial evidence test, the nonmovant must present "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved". *West v. Founders Life Assurance Co. of Florida,* 547 So.2d 870, 871 (Ala. 1989). More simply stated, "[a]n issue is genuine if reasonable persons could disagree". Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 481 (1982).

I. Breach of Contract

Howard first argues that the trial court erred in entering the summary judgment in favor of Wolff on the

claim alleging breach of contract. The determinative question on that issue is whether Howard's employment contract was terminable at will.

"Employees at will can terminate their employment, or can be terminated by their employer, at any time, with or without cause or justification". *Allied Supply Co. v. Brown,* 585 So.2d 33, 35 (Ala. 1991). "Although this doctrine has been criticized as harsh, it remains the law in Alabama." *Id.* If the employment is terminable at will, the employer may even act maliciously in terminating the employee. *Salter v. Alfa Insurance Co.,* 561 So.2d 1050, 1054 (Ala. 1990).

It is undisputed that Howard was not offered lifetime employment of employment of any definite duration. However, Howard argues that her employment was not terminable at will because, she says, she comes within the exception recognized in *Hoffman-La Roche, Inc. v. Campbell,* 512 So.2d 725 (Ala. 1986). Under *Hoffman-La Roche,* an employment contract is not terminable at will if three conditions are met:

> "(1) that there was a clear and unequivocal offer of lifetime employment or employment of a definite duration; (2) that the hiring agent had authority to bind the principal to a permanent employment contract, and; (3) that the employee provided substantial consideration for the contract separate from the services to be rendered."

512 So.2d at 728 (citations omitted).

Howard contends that when she entered into her contract with Wolff, there was an implied covenant that Wolff would not discriminate against her on the basis on race, gender, religion, or national origin. Howard argues

that this covenant is implied in every contract of employment that is governed by the regulations of the Federal Communications Commission ("FCC"), the relevant provisions of which state:

> "Equal employment opportunities - (a) General EEO policy. Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin or sex.
>
> (b) EEO program. Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure opportunity in every aspect of station employment policy and practice. Under the terms of its programs, a station shall:
>
> (1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;
>
> (2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation.

> (3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis;
>
> (4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based on race, color, religion, national origin or sex from its personnel policies and practices and working conditions; and
>
> . . . .
>
> (c)(1) Disseminate its equal opportunity program to job applicants and employees. For example, this requirement may be met by:
>
> . . . .
>
> (i) Posting notices in the station's office and other places of employment, informing employees and applicants for employment of their equal opportunity rights."

47 C.F.R. § 73.2080.

This Court has held that employment policies, especially those in writing, can "become a binding promise once it is accepted by the employee through his continuing to work when he is not required to do so". 512 So.2d at 733. In *Hoffman-La Roche,* certain employment policies were contained in an employee handbook. The Court held that the provisions contained in the employee handbook, when combined with the employee's continuation of employment following the

employee's receipt of the handbook, created a unilateral contract modifying the "at will" employment relationship. The Court stated:

> "[L]anguage contained in a handbook can be sufficient to constitute an offer to create a binding unilateral contract. The existence of such a contract is determined by applying the following analysis to the facts of each case: First, the language contained in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by the issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by retaining employment after he has become generally aware of the offer. His actual performance supplies the necessary consideration."

512 So.2d at 735.

It has long been the law in Alabama that employment is terminable at will by either party for any reason unless there is an express and specific contract for lifetime employment or employment for a specific duration. "[A]bsent an agreement on a definite term, any employment is considered to be 'at-will', and may be terminated by either party, with or without cause or justification." *Clark v. America's First Credit Union,* 585 So.2d 1367, 1369 (Ala. 1991). Furthermore, employees in Alabama bear a heavy burden of proof to establish that an employment relationship is other than "at will". The law considers lifetime or permanent employment contracts to be extraordinary and not lightly to be

implied. *Alabama Mills, Inc. v. Smith,* 237 Ala. 296, 301, 186 So. 699, 704 (1939).

In view of the principle that "absent an agreement on a definite term, any employment is considered to be 'at-will', and may be terminated by either party, with or without cause or justification", we cannot say that the provisions of 47 C.F.R. § 73.2080 could become "a binding promise once [they were] accepted by [Howard] through [her] continuing to work". *Hoffman-La Roche,* 512 So.2d at 733. In short, we cannot hold that the provisions of this federal regulation transformed Howard's at-will employment relationship with Wolff into a permanent one.

II. Fraud

Howard next argues that the summary judgment was also improper as to her fraud claim. Howard alleged in her complaint that Wolff, through a sign posted in the station lobby, "expressly represented to Plaintiff when hiring her that she would not be discriminated against on the basis of sex". (R. 15, 7). Howard alleged that the representation was false and was known by Wolff to be false when it was made.

Howard has not produced substantial evidence to support her claim that the alleged representation by Wolff misrepresented any material existing facts. Thus, Howard's complaint simply alleges, at best, promissory fraud. That is, Howard's complaint simply alleges that Wolff's alleged representation concerning its <u>future conduct</u> was false.

To establish a cause of action for promissory fraud, the plaintiff must prove: (1) that the defendant made a false representation of a material fact; (2) that the false representation was relied upon by the plaintiff;

(3) that the plaintiff was damaged as a proximate result of the reliance; (4) that the representation must have been made with a present intent to deceive; and (5) that when the representation was made the defendant intended not to perform in accordance with it. *Leisure American Resorts, Inc. v. Knutilla,* 547 So.2d 424, 426 (Ala. 1986). Thus, to establish a cause of action for promissory fraud, Howard must prove each element of a cause of action for fraud and also that, at the time the representation was made to Howard, Wolff had a present intent to deceive her. *Valley Properties, Inc. v. Strahan,* 565 So.2d 571 (Ala. 1990).

In *Hanners v. Balfour Guthrie, Inc.,* 564 So.2d 412 (Ala. 1990), the Court was presented with an issue of promissory fraud. In *Hanners,* the plaintiff, a peanut processor/seller, alleged that the defendant, a commodities dealer, had failed to pay for its peanut purchases within the time stated in their contract. The plaintiff alleged that the defendant had opened its account with the plaintiff with a present intent not to honor its contract obligation regarding time for payment and with the intent of deceiving the plaintiff. The Court stated:

> "'The only basis upon which one may recover for fraud, where the alleged fraud is predicted on a promise to perform or abstain from some act in the future . . . is when the evidence shows that, at the time . . . the promises of future action or abstention were made, the promisor had no intention of carrying out the promises, but rather had a present intent to deceive. If such intent is not substantiated by the

> evidence, the fraud claim should not be submitted to the jury. The failure to perform, alone, is not evidence of intent not to perform at the time the promise was made. It if were, a mere breach of contract would be tantamount to fraud.'"

Hanners, 564 So.2d at 414 (citations omitted) (quoting *Hearing Systems, Inc. v. Chandler,* 512 So. 2d 84, 87 (Ala. 1987)).

Howard produced no substantial evidence that Wolff made the alleged representation with a present intent to deceive Howard or with any intent not to perform the obligation at the time the alleged representation was made. Howard admitted that no one at Wolff ever told her anything or made any representation about any policy concerning equal employment or discrimination. Instead, Howard argues that the signing the station lobby stating the general policy that the station was an "equal opportunity employer" constituted a false representation under the law of this State and thus embodied a present intent to deceive. However, Howard never asked anyone at Wolff about the sign or about any related policy of the station. The summary judgment was properly entered in favor of Wolff on Howard's claim of promissory fraud.

III. Public Policy

Finally, Howard argues that, even assuming that a unilateral contract did not exist and that the "at-will" doctrine applies, there should be a public policy exception to that doctrine in this case.

The employment "at-will" doctrine was first recognized in Alabama in *Howard v. East Tennessee, v. & G. Ry.,* 91 Ala. 268, 8 So. 868 (1891). This doctrine

provides "that an employment contract terminable at the will of either the employer of the employee may be terminated by either party at any time with or without cause." *Grant v. Butler,* 590 So.2d 254 (Ala. 1991). Howard argues that because the doctrine is a judicially created one, the judiciary can and should abolish or modify it.

However, this Court has so far declined to judicially create a public policy exception to the employment "at-will" doctrine. *See Grant v. Butler,* 590 So.2d 254 (Ala. 1991); *Salter v. Alfa Insurance Co.,* 561 So.2d 1050 (Ala. 1990); *Bosarge v. Bankers Life Co.,* 541 So.2d 499 (Ala. 1989); and *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130 (Ala. 1977). On the other hand, this Court has consistently chosen to apply the doctrine and to leave the creation of exceptions to the legislature. *See, e.g., Meeks v. Opp Cotton Mills, Inc.,* 459 So.2d 814 (Ala. 1984) (Court refused to create an exception for employees terminated as a result of filing claims for worker's compensation benefits); and *Bender Ship Repair, Inc. v. Stevens,* 379 So.2d 594 (Ala. 1980) (Court refused to create an exception for employees discharged for performing jury duty). When this Court refused to create an exception in *Meeks,* the legislature created a limited statutory exception permitting an employee terminated solely because he or she has made a claim for worker's compensation benefits to file an action for damages. Ala. Code 1975, § 25-5-11.1. Likewise, *Bender* has also been effectively overruled by the legislature's adoption of a statute preventing dismissal of an employee because the employee answered a call for jury service. Ala. Code 1975, § 12-16-8.1.

The Court has consistently refused to create a

cause of action for wrongful discharge on "public policy" grounds, for three reasons: (1) to do so would abrogate the inherent right of contract between employer and employee; (2) to do so would be to overrule the well-established employment law; and (3) "contrary to public policy" is too vague or nebulous a standard to justify creation of a new tort. *Salter,* 561 So.2d at 1052. (Quoting *Hinrichs v. Tranquilaire Hospital,* 352 So.2d 1130, 1131-32 (Ala. 1977).)

Howard urges the Court to adopt a narrow public policy exception to the employment "at-will" doctrine based on principles of non-discrimination. Indeed, many States have carved out exceptions to the employment "at-will" doctrine. *See, e.g., Sterling Drug, Inc. v. Oxford,* 294 Ark. 239, 743 S.W.2d 380 (1988); *Wheeler v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 92 Ill.Dec. 561, 485 N.E.2d 372 (1985); *Parnar v. Americana Hotels, Inc.,* 65 Haw. 370, 652 P.2d 625 (1982); *Nees v. Hocks,* 272 Or. 210, 536 P.2d 512 (1975); and *Geary v. United States Steel Corp.,* 456 Pa. 171, 319 A.2d 174 (1974). Howard, in her brief, recognizes that this Court "has so far refused to allow a public policy exception to the employment 'at will' doctrine," but she says that "it is clear that the national trend exists for the adoption of a public policy exception to the employment 'at will' doctrine in the State of Alabama." Howard cites the special concurrence in *Salter v. Alfa Ins. Co.,* 561 So.2d 1050, 1055 (Ala. 1990), in support of her argument that the termination here strikes at the very heart of her argument that the termination here strikes at the very heart of her personal right not to be discriminated against. In *Hinrichs v. Tranquilaire,* 352 So.2d 1130, 1131-32 (Ala. 1977), this Court was asked, but it refused, to create a public policy

exception and to recognize a cause of action for damages for wrongful termination in a case in which the employee was discharged because she would not falsify certain medical records. Three Justices dissented in that case, but it has not been overruled.

On the public policy issue, the Congress of the United States has elected to exempt Wolff from the provisions of law relating to discrimination in employment. While we recognize that under the provision of 47 C.F.R. § 73.2080, Wolff is prohibited from discriminating on the basis of sex, we do not think, especially in view of the principle stated in *Hinrichs,* that we should judicially create a wrongful discharge action based on "public policy" grounds in this case involving a licensee of the FCC. In refusing to adopt a "public policy" exception, we should not be understood as condoning a person's discharge because of gender. We merely hold that it is the province of the legislature to create such an exception, if it should determine that employees such as Howard, who cannot come within the provisions of the Equal Employment Act, should be given the right to sue for damages.

The legislature, when it meets, may desire to create a cause of action in circumstances such as those presented here. The legislature effectively overruled *Meeks v. Opp Cotton Mills* and *Bender Ship Repair, Inc. v. Stevens* when it provided in §§ 25-5-11.1 and 12-16-8.1, respectively, for a remedy under limited circumstances. In short, the legislature has shown its willingness and ability to respond to perceived injustices that can result by a strict application of the long-standing doctrine of employment "at-will." Thus, we again decline to modify the employee-at-will doctrine by creating a

public policy exception and defer to the judgment of the legislature.

For the foregoing reasons, judgment of the trial court is affirmed.

AFFIRMED.

Houston, Steagall, Kennedy, and Ingram, JJ., concur.